IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA.

RSA No. 266 of 1996

Reserved on : 17.8.2007

Date of decision : September 6th, 2007

Prem Singh …Appellant-plaintiff

Versus:

Amrik Singh …Respondent-defendant.

***Coram*:**

The Hon'ble Mr.Justice Sanjay Karol, Judge.

Whether approved for reporting?[1] *No*

For the appellant-: plaintiff — Pt. Om Parkash Sharma, Advocate.

For the respondent-. defendant. — Mr. Ajay Sharma, Advocate.

Sanjay Karol, J.

The present appeal has been filed assailing the judgment and decree dated 31.10.1995 passed by the Additional District Judge, Kangra at Dharamshala in Civil Appeal No. 106/N/XIII/94, titled as Amrik Singh v. Prem Singh, reversing the judgment and decree dated 31.3.1994 passed by the Sub Judge Ist Class, Court –II, Nurpur, Distt. Kangra, in case No. 15/91 titled as Prem Singh v. Amrik Singh.

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[1] **Whether reporters of Local Papers may be allowed to see the judgment?**

For the purpose of convenience, parties are herein referred to as 'the appellant-plaintiff and respondent-defendant.

Plaintiff filed a suit for possession of land comprised in Khata No. 4 min, Khatauni No. 20, Khasra No. 199, land measuring 0-02-30 HM (9 marlas) situated in tikka and Mauza Bhumbla, Basantpur, Tehsil Indora, District Kangra. The suit was filed stating that the plaintiff and a co-sharer are recorded as owners in possession of the suit land as per revenue record, jamabandi for the year 1976-77 and Parcha Misal Hakiyat for the year 1981-82. In the settlement proceedings in the year 1982, the defendant in connivance with the revenue officials got the possession of the suit land recorded in his favour and, therefore, forcibly and illegally dispossessed the plaintiff in December, 1986.

In the written statement filed by the defendant, the ownership of the plaintiff is admitted. However, the suit of the plaintiff is resisted on the ground that the defendant had become owner by way of adverse possession being in possession for more than 30 years in an open and hostile manner, peacefully and without any interruption to the knowledge of the plaintiff. Since 1962-63, the defendant has planted Guava orchard and is enjoying the suit land as owner thereof. The plaintiff had declared the suit land as surplus. That the parties are neighbours is also admitted.

Based on the pleadings of the parties, the trial Court framed the following issues:-

"1. Whether the plaintiff alongwith other co-sharers is owner of the suit land, as alleged? OPP

2. Whether the plaintiff and other co-sharers were dispossessed by the defendant from the suit land in December, 1986, as alleged? OPP

3. Whether the plaintiff has no locus standi to sue, as alleged? OPD

4. Whether the State of H.P. is a necessary party to the suit, as alleged? OPD

5. Whether the plaintiff is estopped by his act and conduct to file the present suit, as alleged? OPD

6. Whether the suit is time barred, as alleged? OPD

7. Whether the suit is not properly valued for the purposes of court fee ad jurisdiction, as alleged? ….OPD

8. If issue No.1 is not proved, whether the defendant has become owner of the suit land by way of adverse possession, as alleged? OPD

9. Relief."

Plaintiff examined himself as PW-1 and got exhibited documents Exts.P-1 & P-2, which are the copies of the revenue record showing the ownership and possession of the plaintiff of the suit land for the years 1981-82 and 1976-77. The defendant got himself examined as DW-1 and produced another witness Shri Darshan Singh (DW-2). No document has been filed and exhibited by the defendant.

Based on the material on record, the trial Court answered the issues No.1 & 2 in favour of the plaintiff and issues

No. 3 to 8 against the defendant and came to the conclusion that in view of the documentary evidence on record as also the statements of the parties, it could not be said that the defendant is in possession of the suit land since the year 1962-63. On the plea of adverse possession, the Court below, after referring to the deposition of the witnesses came to the conclusion that from the defendant's statement, it was clear that the plea of adverse possession was not taken and infact his possession was that of a permissive user.

The trial Court referred to the statement of Shri Darshan Singh (DW-2), who admitted that eucalyptus (safeda) trees were 5 to 6 years old, which coincides with the period of dispossession of the plaintiff. Suit of the plaintiff was decreed by the Court in terms of judgment and decree dated 31.3.1994.

Defendant preferred an appeal before the Additional District Judge, Kangra at Dharamshala, which was registered as Civil Appeal No. 106/N/XIII/94. While reversing the decree, the appellate Court has held that the plaintiff has not been able to establish his possession on the suit land and the defendant had been in possession of the suit land for more than 12 years. In the absence of any forcible dispossession, the version of the plaintiff could not be believed. The Court held that since the defendant was in possession for more than 12 years prior to the date of institution of the suit, the possession of the defendant was adverse. Consequently, the first Appellate Court reversed

the judgment and decree passed by the trial Court. Therefore, the present appeal assailing the said judgment.

The appeal was admitted on the following substantial questions of law:-

> "1. Whether possession simpliciter, however long, is sufficient to establish maturing of title by adverse possession?
>
> 2. Whether the party ascerting adverse possession has to specifically establish the date of entering into possession and ascerting hostile title for obtaining a decree on the basis of adverse possession?
>
> 3. Whether on the facts and circumstances as established on the record of the case, the defendant is able to prove maturing of his title in the land in dispute by way of adverse possession?
>
> 4. Whether the presumption of truth attached to the jamabandi of 1976-77 showing the appellant as owner in possession stand rebutted by the evidence of the respondent?"

Learned counsel for the appellant has assailed on the ground that the Court has totally misapplied and misconstrued the principle of law with regard to adverse possession and consequently, the judgment needs to be set aside.

Per contra, the learned counsel for the respondent has argued that no substantial question of law arises for consideration at all. Question of adverse possession is a pure question of fact not to be gone into by this Court in second appeal. The adverse possession of the defendant stands proved through the depositions of DW-1 & DW-2 and also revenue

entries Ext.P-1. Defendant is in possession of part of the land in question. The revenue entry Ext.P-1 has not been prepared in connivance with the revenue authorities but demonstrate the factual position of possession of the defendant on the ground. Therefore, the plaintiff could not have been in possession uptill 1986 as has been claimed by him in the plaint.

Relying upon Exts.P-1 & P-2, the trial Court found that the defendant's plea that he is owner in possession of the suit land since 1962-63, is not based on any documentary evidence but oral statement of the defendant's witnesses. Defendant's witness (DW-2) infact has supported the case of the plaintiff inasmuch as in the cross-examination he has admitted that the eucalyptus trees were planted just about 5-6 years prior to the date of filing of the suit. The age of the trees correspond with the date given by the plaintiff of dispossession and, therefore, the possession of the defendant on the suit land could not be said to be from the year 1962-63. The trial Court further held that the plea of adverse possession put forth by the defendant is untenable in law as it has nowhere been stated by the defendant that his possession was hostile to that of the plaintiff. The statement is only to the effect that the plaintiff never objected to the possession of the defendant.

The trial Court has concluded as under:-

> 'The defendant Amrik Singh while being examined on oath did not say even a single word of his having owner of the suit land by way of adverse possession

rather he has stated that the plaintiff never objected his possession over the suit land. DW-2 Shri Darshan Singh has corroborated the version of the DW-1 stated that the defendant is in possession f the suit land since 1964-65 and having planted guava tree. In his cross-examination this witness has admitted that the Safeda tree was ageing of 5/6 years. This very fact also supported the case of the plaintiff as regard the period of dispossession. Interestingly, DW-2 Shri Darshan Singh has stated that the defendant had taken possession of the suit land by ploughing the field but this fact has neither been pleaded by the defendant in his written statement nor stated by him while being examined on oath rather the defendant does not say anything about the hostility qua possession except that the plaintiff has never objected his possession over the suit land. Hence, the hostility in denial to the real owner i.e. plaintiff and other co-shares is not established. The possession if permissive cannot construed as adverse possession in any circumstances. In view of the foregoing discussion, I proceed to hold that the defendant has not become owner of the suit land by way of adverse possession. Accordingly, issue No.8 is decided in negative, against the defendant and in favour of the plaintiff."

I have seen the statements of the witnesses. Defendant No.1 has deposed that he is in possession since the year 1964-65 and the same was never objected to by the plaintiff and that he treated his possession as owner. The plaintiff had declared the land in dispute as surplus.

In ***P.T. Munichikkanna Reddy and others*** v. ***Revamma and others*** (2007(6) SCC 59), the apex Court has held as under:-

> "To understand the true nature of adverse possession, Fairweather v St Marylebone Property Co [1962] 2 WLR 1020, [1962] 2 All ER 288 can be considered where House of Lords referring to Taylor v. Twinberrow [1930] 2 K.B. 16, termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law.
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> Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:
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> 1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
>
> 2. Specific Positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.
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> What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is

reasonably practicable and so far as the processes of the law will allow.

A peaceful, open and continuous possession as engraved in the maxim nec vi, nec clam, nec precario has been noticed by this Court in Karnataka Board of Wakf v. Government of India and Others [(2004) 10 SCC 779] in the following terms:

> "Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

Thus the test of nec vi, nec clam, nec precario i.e., "not by force, nor stealth, nor the license of the owner" has been an established notion in law relating to the whole range of similarly situated concepts such as easement, prescription, public dedication, limitation and adverse possession.

> "29. In terms of Article 65 the starting point of limitation does not commence from the date when the right of ownership arises to the plaintiff but commences from the date the defendants possession becomes adverse.
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> Human rights have been historically considered in the realm of individual rights such as, right to health, right to livelihood, right to shelter and employment etc. but now human rights are gaining a multifaceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context. The activist approach of the English Courts is quite visible from the judgement of Beaulane Properties Ltd. v. Palmer [2005 (3) WLR 554 : 2005 EWHC 817 (Ch.)] and JA Pye (Oxford) Ltd v. United Kingdom [2005] ECHR 921 [2005] 49 ERG 90, [2005] ECHR 921], The court herein tried to read the Human Rights position in the context of adverse possession. But what is commendable is that the dimensions of human rights has widened so much that now property dispute issues are also being raised within the contours of human rights."

By applying the principles in the present case, it cannot be stated that the defendant's possession is hostile to that of the plaintiff and, in my view, as has been rightly held by the trial Court, it is at best permissive in nature. The defendant is neighbour of the plaintiff. From Exts. P-1 & P-2, which are the revenue entries, it is clear that prior to the year 1982-83,

plaintiff is shown as owner in possession of the said land. Plaintiff is right in contending that the defendant, in collusion with the revenue officials during the course of the settlement proceedings, had manipulated the record to show the defendant in possession of the suit land. This is quite evident from the fact that the plaintiff still continues to be shown as the owner of the land. If the defendant was in possession of the suit land since the year 1962-63 and had become owner thereof either by way of adverse possession or otherwise then the defendant's name would have been reflected as owner in the revenue record. Perusal of the statements of DWs-1 & 2 would show that they have nowhere taken the plea of adverse possession. In fact contrary to the pleadings, their deposition is to the effect that they are in possession with the consent of the plaintiff. The plea, therefore, is self contradictory. Further, there is nothing on record to show that the plaintiff had declared this land surplus and the same had vested in the Government. If this was so, the defendant himself would have had no right of ownership or possession of the same.

While reversing the judgment of the trial Court, the Appellate Court held :-

> "I have carefully looked into the authority cited by the learned counsel for the respondent. The learned trial Court had also relied on this authority so as to negative the claim of the appellant. I find that the ruling cited by the respondent, in no way, helped him. The appellant had been in possession of the suit land

> for a period exceeding 12 years to the institution on 30.11.1990 of the suit. It was nowhere the case of the respondent that the appellant had been in permissive possession. The appellant and his one witness had stated in so many words the possession so as to prescribe title by adverse possession. It was not necessary for the appellant to actually inform the respondent of his hostile action. The appellant had been in peaceful, open and continuous possession of the suit land. The appellant impliedly had denied the title of the respondent, and, hence his possession was hostile and was bound to be treated adverse. The respondent had ceased to be owner of the suit land. "

Now, this needs to be examined in view of the ratio of law laid down in ***P.T. Munichikkanna Reddy*** (supra). The findings of the first Appellate Court that the appellant being in possession of the suit land for a period exceeding 12 years would confer right on him is thus erroneous and contrary to the settled principle of law.

Keeping in view the totality of the circumstances, I am of the considered view that the principle of law laid down by the Apex Court fully applies and case of adverse possession conferring right of ownership on the defendant, is not made out and, therefore, the first Appellate Court has seriously erred in interfering and reversing with the well reasoned judgment and decree passed by the trial Court.

Therefore, in my view, the present appeal raises a substantial question of law inasmuch as the Court below has

misinterpreted and misapplied the provisions of law as also misconstrued the facts to come to a perverse finding necessitating interference by this Court. The substantial questions of law are answered accordingly.

The judgment and decree dated 31.10.1995 passed by the Ist Appellate Court is set aside and that of the trial Court is restored.

(Sanjay Karol),
Judge.

September 6th, 2007.
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